

1 HILARY E. YOUNGBLOOD (admitted *pro hac vice*),
2 California Bar No. 258026
2 hyoungblood@dblawsf.com
DAVIDOVITZ + BENNETT
3 101 Montgomery Street, 25th Floor
4 San Francisco, CA 94104-4176
4 TEL: (415) 956-4800
5 FAX: (415) 788-5948

5
6 Attorneys for Defendant,
6 SUTTER WEST BAY HOSPITALS, doing business as
7 CALIFORNIA PACIFIC MEDICAL CENTER

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 IN RE: Bard IVC Filters) MDL No. 2:15-md-02641-DGC
Products Liability Litigation)
11) ND CA - 4:15cv5189;
This Document Relates to:) AZ Member Case - 2:16cv344
12 WAYNE RUDEN v. C.R. BARD, INC.,)
et al.)
13) REPLY IN SUPPORT OF DEFENDANT
14) CALIFORNIA PACIFIC MEDICAL
15) CENTER'S MOTION TO DISMISS
16) PLAINTIFF'S AMENDED COMPLAINT
17) UNDER FED.R.CIV.P. 12(b)(6)
18) AND 12(e); OR IN THE
19) ALTERNATIVE FOR MOTION TO
20) REMAND UNDER 28 U.S.C. §
21) 1447(c) AND FED.R.CIV.P.
22) 12(b)(1)



TABLE OF CONTENTS

	<u>Page(s)</u>
I. SUMMARY OF REPLY	1
II. LEGAL ARGUMENT IN REPLY	1
A. PLAINTIFF HAS FAILED TO PLEAD FACTS TO SHOW THAT CPMC BREACHED ANY DUTY OF CARE OWED TO PLAINTIFF	1
1. Plaintiff's Citations in Support of His Argument Regarding a Hospital's Duty of Care Are Inapposite	1
2. Plaintiff's Reliance on <i>Elam</i> to Establish CPMC's Duty of Care Is Misplaced	3
3. Plaintiff Cannot Sustain His Burden to Prove Proximate Causation of His Damages Against CPMC .	4
B. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR NEGLIGENCE MISREPRESENTATION	5
C. PLAINTIFF HAS FAILED TO ALLEGE A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY	6
D. THE AMENDED COMPLAINT'S INCONSISTENT FACTUAL ALLEGATIONS ARE GROUNDS FOR DISMISSAL	8
E. PLAINTIFF'S PUNITIVE DAMAGES CLAIM IS IMPROPER . . .	9
F. PLAINTIFF'S ACTION IS FOUNDED ENTIRELY IN PRODUCT LIABILITY	10
III. CONCLUSION	11

TABLE OF AUTHORITIESCASES

		<u>PAGE (S)</u>
4	<i>Auto Equity Sales, Inc. v. Superior Court,</i> 57 Cal.2d 450 (1962)	8
5		
6	<i>Baisden v. Bayer Corp.,</i> 275 F.Supp.2d 759 (S.D.W. Virginia 2003)	8, 9
7		
8	<i>Berman v. Bromberg,</i> 56 Cal.App.4th 936 (1997)	9
9		
10	<i>Coleman v. Standard Life Insurance Co.,</i> 288 F.Supp.2d 1116 (E.D. CA 2003)	8
11		
12	<i>Derrick v. Ontario Community Hospital,</i> 47 Ca.App.3d 145 (1975)	6, 7
13		
14	<i>Elam v. College Park Hospital,</i> 132 Cal.App.3d 332 (1982)	3, 4
15		
16	<i>Hector v. Cedars-Sinai Medical Center,</i> 180 Cal.App.3d 493 (1986)	10
17		
18	<i>Jackson v. East Bay Hosp.,</i> 980 F.Supp 1341 (N.D. Cal. 1997)	10
19		
20	<i>Meyer v. McNutt Hospital,</i> 173 Cal. 156 (1916)	2
21		
22	<i>Moore v. Regents of University of California,</i> 51 Cal.3d 120 (1990)	7, 8
23		
24	<i>Rice v. California Lutheran Hospital,</i> 27 Cal.2d 296 (1945)	2
25		
26	<i>Silverhart v. Mount Zion Hospital,</i> 20 Cal.App.3d 1022 (1971)	10
27		
28	<i>Stafford v. Shultz,</i> 42 Cal.2d 767 (1954)	5
24	<i>State of California v. Superior Court,</i> 150 Cal.App.3d 848 (1984)	5
25		
26	<i>Steiner v. Rowley,</i> 35 Cal.2d 713 (1950)	9
27		
28	<i>Thomas v. Seaside Memorial Hospital of Long Beach,</i> 80 Cal.App.2d 841 (1947)	2
	//	

	<u>CASES (CONTINUED)</u>	<u>PAGE (S)</u>
1		
2		
3	<i>Valentin v. La Societe Francaise,</i> 76 Cal.App.2d 1 (1946)	2
4	<i>Wohlgemuth v. Meyer,</i> 139 Cal.App.2d 326 (1956)	8
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

I. SUMMARY OF REPLY

Plaintiff's Opposition argues that CPMC had a duty to supervise and verify BARD's representations about its product, and an infinite duty to update Plaintiff about BARD's products. However, California law does not support Plaintiff's theories. Imposition of such onerous duties on a hospital would unjustifiably expand California law regarding a hospital's duty of care toward the patients under its care.

Plaintiff has failed to show that CPMC had a legal duty to him, and has failed to plead facts sufficient to satisfy causation, his Amended Complaint against CPMC is fatally deficient. Accordingly, this Court should grant CPMC's Motion to Dismiss.

II. LEGAL ARGUMENT IN REPLY

A. PLAINTIFF HAS FAILED TO PLEAD FACTS TO SHOW THAT CPMC BREACHED ANY DUTY OF CARE OWED TO PLAINTIFF

1. Plaintiff's Citations in Support of His Argument

Regarding a Hospital's Duty of Care Are Inapposite

CPMC does not dispute that a hospital generally owes a duty of care to patients while under its care. The issue presented here, however, is whether a hospital's duty of care to patients continues indefinitely, long after implantation of a device manufactured by an unrelated party. California law does not impose any such a duty.

None of the cases cited by Plaintiff support his claim that CPMC had an affirmative duty to seek information regarding the BARD product, and a continuous duty to relay this

1 information to the Plaintiff, many years after the surgery.
 2 Instead, Plaintiff relies on case law which with liability
 3 arising from events which occurred *during* the subject
 4 hospitalization, due to the conduct of hospital employees.

5 In *Meyer v. McNutt Hospital*, 173 Cal. 156 (1916), the
 6 issue was whether a hospital breached its duty of care to an
 7 unconscious patient who was burned while *in the hospital*. In
 8 *Valentin v. La Societe Francaise*, 76 Cal.App.2d 1 (1946), the
 9 issue was whether the inaction of hospital employees toward a
 10 patient while *in the hospital* constituted a breach of the
 11 hospital's duty of care. In *Thomas v. Seaside Memorial*
Hospital of Long Beach, 80 Cal.App.2d 841 (1947), the court
 13 imposed a "duty of the hospital to use reasonable care and
 14 diligence in safeguarding a patient committed to its charge,"
 15 (*Id.* at 847), after a patient died while she was *in the*
 16 *hospital*. In *Rice v. California Lutheran Hospital*, 27 Cal.2d
 17 296 (1945), at issue was the scope of a hospital's duty of care
 18 toward mentally impaired patients who were injured while *in the*
 19 *hospital*.

20 The Rice Court defined the scope of a hospital's duty of
 21 care:

22 The measure of duty of a hospital is to exercise
 23 that degree of care, skill, and diligence used by
 24 hospitals generally in that community, and
 required by the express or implied contract of
 the undertaking. [Citation.]

25 (*Id.* at 299.)

26 Plaintiff's Amended Complaint fails to allege facts to
 27 show that CPMC did not exercise the degree of care, skill, and
 28 diligence used by hospitals generally in its community.

1 Plaintiff does not allege that other hospitals in the community
 2 banned the BARD device, or that any other hospital communicated
 3 warnings to patients who had received such implant.

4 Hence, Plaintiff's Amended Complaint fails to allege a
 5 breach of CPMC's duty of care. Plaintiff's Opposition to this
 6 motion only cites to cases which establish a hospital's duty
 7 of care to patients while in the hospital, which is unrelated
 8 to Plaintiff's claims.

9 **2. Plaintiff's Reliance on *Elam* to Establish CPMC's Duty**
 10 **of Care Is Misplaced**

11 In *Elam v. College Park Hospital*, 132 Cal.App.3d 332
 12 (1982), the issue was whether a hospital could be held liable
 13 under the doctrine of corporate negligence for the negligence
 14 of a podiatrist in performing a surgery on a patient at the
 15 hospital. The *Elam* Court opined, "a hospital is accountable
 16 for negligently screening the competency of its medical staff
 17 to insure the adequacy of medical care rendered to patients at
 18 its facility." *Id.* at 346.

19 *Elam* does not apply here. *Elam* only holds that a hospital
 20 has a duty to screen its medical staff for competency. It does
 21 not hold that a hospital has a duty to screen product
 22 manufacturers for competency. The reasoning behind *Elam's*
 23 holding is that a hospital, "is in the best position to
 24 evaluate the competence of physicians it, in its discretion,
 25 allows to perform surgery and to practice within its
 26 premises...." *Id.* at 345. This rationale does not apply to
 27 manufacturers with whom the hospital has no such relationship,
 28 does not control, and whom are regulated by independent

1 agencies. To accept Plaintiff's proposition and hold that a
 2 hospital has a duty to individually screen each and every
 3 manufacturer of medical products that are used by physicians
 4 on its premises would improperly distort and expand the
 5 reasoning behind the *Elam* Court's holding.

6 Furthermore, the *Elam* facts concerned the qualifications
 7 of the surgeon who performed surgery. Here, the issue is
 8 neither the qualifications of Plaintiff's doctors nor the
 9 quality of the surgery they performed. The issue is
 10 communication between Plaintiff and his physicians before and
 11 after the surgery. *Elam* does not hold that a hospital has a
 12 duty to supervise communications between a patient and his
 13 physician -- before and after the patient's stay in the
 14 hospital -- to determine the substance of these communications.

15 Plaintiff's expansive theory of a hospital's duty of care
 16 is contrary to California law. Therefore, CPMC's Motion to
 17 Dismiss should be granted.

18 **3. Plaintiff Cannot Sustain His Burden to Prove Proximate**
 19 **Causation of His Damages Against CPMC**

20 Plaintiff contends that CPMC should have advised him not
 21 to have the BFR inserted, or later on CPMC should have advised
 22 him to have the BFR removed, and that CPMC's failure to so
 23 advise him is the causation of his damages. However, Plaintiff
 24 does not contend that he would in fact have opted not to have
 25 the BARD BFR inserted, or that he would have later opted to
 26 have it removed. The Amended Complaint therefore fails to
 27 allege proximate causation against CPMC.

28 *In State of California v. Superior Court*, 150 Cal.App.3d

848 (1984), the Court of Appeal reasoned that the Real Estate Commissioner's failure to investigate the plaintiffs' complaints about real estate licensees could not be the proximate cause of a licensee's allegedly unlawful appropriation of plaintiffs' funds, because there was no reasonable assurance that sanctions would have been imposed upon licensees that would have prevented plaintiffs' subsequent losses, even if the commissioner had used due care to investigate the complaint. Therefore, plaintiffs could not recover on their claim against the State based on the Commissioner's failure to investigate the licensees.

Analogously here, even assuming CPMC had a duty to communicate to Plaintiff information about BARD's products, there is no reasonable assurance that such communication would have prevented Plaintiff's damages. Therefore, Plaintiff cannot show that CPMC's alleged conduct proximately caused his damages, and his Amended Complaint thus fails to state a valid cause of action against CPMC.

B. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION

Plaintiff cites a single case, *Stafford v. Shultz*, 42 Cal.2d 767 (1954), in support of his position that CPMC is liable for negligent misrepresentation. Yet, as Plaintiff explains in his own Opposition, *Stafford* explicitly refers to "fraud" -- i.e., intentional misrepresentation. Plaintiff fails to address the distinction between negligent and intentional misrepresentation, which is the key point in CPMC's Motion to Dismiss. (See CPMC's Motion to Dismiss Docket No.

1 870, at 11:1 - 12:3).

2 Plaintiff's Opposition also fails to address CPMC's
3 argument and supporting *stare decisis* that a hospital does not
4 have a duty to verify allegedly false information disseminated
5 by manufacturers to the health care industry. The FAC does not
6 allege sufficient facts establishing that CPMC owed him a duty
7 to communicate **any** information regarding the BARD product, or
8 that CPMC ever made **any** representation to Plaintiff regarding
9 such product. Plaintiff's cause of action for negligent
10 misrepresentation is supported entirely by nonexistent duties
11 and conclusory allegations. Therefore, since Plaintiff has
12 failed to plead sufficient facts to satisfy the elements of
13 negligent misrepresentation, this Court should grant CPMC's
14 Motion to Dismiss.

15 **C. PLAINTIFF HAS FAILED TO ALLEGE A CAUSE OF ACTION FOR**
16 **BREACH OF FIDUCIARY DUTY**

17 Contrary to Plaintiff's claim, the decision in *Derrick v.*
18 *Ontario Community Hospital*, 47 Ca.App.3d 145 (1975), applies
19 here since the Court's decision that the hospital owed
20 plaintiff no duty except under the Health and Safety Code was
21 premised in part upon a hospital's lack of duty of disclosure
22 to its patient, when such disclosure would interfere with the
23 relationship between physician and patient. Plaintiff
24 misinterprets *Derrick* to hold that the hospital owed no
25 "fiduciary" duty under statute to report the possibility of
26 disease to the general public. First, the court held the
27 opposite, and found that such statutory duty could be imposed
28 upon the hospital, but that it did not have a corresponding

1 common law duty. Second, *Derrick* did not address the
 2 "fiduciary" duty issue.

3 Similarly untenable is Plaintiff's attempt to distinguish
 4 *Moore v. Regents of University of California*, 51 Cal.3d 120
 5 (1990). Contrary to Plaintiff's claim that "Moore did not deal
 6 with the issue of a hospital's fiduciary duty to reveal
 7 material information to a patient" (Opposition at 9:1-2), *Moore*
 8 did exactly that. In *Moore*, the California Supreme Court
 9 rejected the claim that a medical center had a fiduciary
 10 relationship with a patient. The *Moore* plaintiff underwent a
 11 procedure at the medical center, at which time his physician
 12 removed organs and took fluid samples. Plaintiff sued the
 13 physician and the medical center on many theories, including
 14 breach of fiduciary duty. He claimed the defendants used his
 15 cells in research without his permission, and that, "his
 16 physician failed to disclose preexisting research and economic
 17 interests in the cells" *Id.* at 125.

18 The Supreme Court held that the plaintiff had stated a
 19 claim for breach of fiduciary duty against his physician, but
 20 **not** as to the remaining defendants including the medical
 21 center, holding:

22 The[y] ... are not physicians. In contrast to
 23 [the physician], none of these defendants stood
 24 in a fiduciary relationship with Moore or had
 25 the duty to obtain Moore's informed consent to
 26 medical procedures. If any of these defendants
 27 is to be liable for breach of fiduciary duty or
 performing medical procedures without informed
 consent, it can only be on account of [the
 physician's] acts and on the basis of a
 recognized theory of secondary liability, such
 as *respondeat superior*.

28 *Id.* at 133. *Moore* therefore controls, and establishes that a

1 hospital does not owe a fiduciary duty of care to patients.

2 Finally, Plaintiff's reliance on *dicta* in *Wohlgemuth v.*
 3 *Meyer*, 139 Cal.App.2d 326 (1956), a sixty-year-old appellate
 4 court decision, to contradict a more recent Supreme Court
 5 decision is a violation of the *stare decisis* doctrine. *Stare*
 6 *decisis* mandates that, "all tribunals exercising inferior
 7 jurisdiction are required to follow decisions of courts
 8 exercising superior jurisdiction [....] Courts exercising
 9 inferior jurisdiction must accept the law declared by courts of
 10 superior jurisdiction. It is not their function to attempt to
 11 overrule decisions of a higher court. [Citation.]" *Auto Equity*
 12 *Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962).

13 There is no legal basis for Plaintiff's attempt to impose
 14 a fiduciary duty on CPMC. Plaintiff's Amended Complaint
 15 therefore fails to state any valid claim against CPMC.

16 **D. THE AMENDED COMPLAINT'S INCONSISTENT FACTUAL ALLEGATIONS**

17 **ARE GROUNDS FOR DISMISSAL**

18 Plaintiff cannot justify his improper attempt to plead
 19 alternate theories by relying on *Coleman v. Standard Life*
 20 *Insurance Co.*, 288 F.Supp.2d 1116 (E.D. CA 2003), which
 21 addressed the question of whether ERISA preempted state claims,
 22 and is inapplicable here. In *Coleman*, the issue was whether
 23 the defendant was an ERISA fiduciary. The complaint
 24 consistently alleged that defendant wrongfully denied plaintiff
 25 certain benefits. It did not set forth a set of facts which
 26 "undercut, defeated, and made impossible" the defendant's
 27 liability. *Baisden v. Bayer Corp.*, 275 F.Supp.2d 759, 763
 28 (S.D.W. Virginia (2003)). Thus, Plaintiff relies on an

1 inapposite ERISA case, and ignores *Baisden*.

2 Under California law, "[a] complaint may plead inconsistent
3 causes of action if there are no contradictory or antagonistic
4 facts." *Berman v. Bromberg*, 56 Cal.App.4th 936, 944-945
5 (1997). As held in *Steiner v. Rowley*, 35 Cal.2d 713, 718-719
6 (1950), "unless the alternate pleadings contain antagonistic
7 statements, the statement of facts sufficient to constitute a
8 cause of action in one count is not a bar to the maintenance of
9 a separately stated count in the same pleading based upon
10 inconsistent allegation."

11 Plaintiff must allege facts that are not inherently
12 inconsistent. Plaintiff's contradictory allegations that,
13 "CPMC knew the BRF was defective ... or, in the alternative,
14 BARD concealed dangers known to BARD from CPMC" [Amended
15 Complaint, at 3:19-21], is itself sufficient grounds for
16 dismissal of CPMC.

17 **E. PLAINTIFF'S PUNITIVE DAMAGES CLAIM IS IMPROPER**

18 Plaintiff cannot escape his fatal failure to satisfy the
19 minimum pleading requirements for punitive damages as required
20 by California Civil Code section 3294.

21 Plaintiff cites to *Jackson v. East Bay Hosp.*, 980 F.Supp
22 1341 (N.D. Cal. 1997) in his Opposition, but the Court in
23 *Jackson* struck down the punitive damages claims because the
24 facts plead in that case did not rise to the level to show the
25 oppression, fraud, and malice as required by section 3294.

26 Just like the plaintiff in *Jackson*, Plaintiff's conclusory
27 claim that CPMC acted maliciously does not meet the specific
28 pleading requirements to support a punitive damages claim.

1 **F. PLAINTIFF'S PRODUCT LIABILITY ACTION IS INVALID AS TO CPMC**

2 That the gravamen of Plaintiff's action is products
 3 liability has direct bearing on whether Plaintiff may state a
 4 valid cause of action against CPMC. He cannot. Plaintiff
 5 claims injuries from a defective medical implant. CPMC's only
 6 connection here that the surgery occurred on its premises.
 7 California law does not subject hospitals to product liability.

8 Plaintiff tries to distinguish "strict liability" from
 9 "product liability," a distinction without a difference.
 10 *Silverhart v. Mount Zion Hospital*, 20 Cal.App.3d 1022 (1971),
 11 and *Hector v. Cedars-Sinai Medical Center*, 180 Cal.App.3d 493,
 12 505 (1986), make no such distinction, and CPMC is not aware of
 13 any. Plaintiff's claim that CPMC "was part of the stream of
 14 commerce which placed the BRF in Mr. Ruden" is simply wrong.
 15 Plaintiff has a claim for strict product liability against the
 16 manufacturer. Plaintiff does not have a claim for product
 17 liability against CPMC. Plaintiff's Amended Complaint is
 18 simply untenable as to CPMC.

19 Finally, Plaintiff concedes that the Ninth Cause of Action
 20 for Negligent Recall/Retrofit is improper as to CPMC. (See
 21 Opposition, Docket No. 995 at p. 1, fn. 1.) At the very
 22 minimum, CPMC requests that the Court dismiss plaintiff's Ninth
 23 Cause of Action with prejudice as to CPMC.

24 //

25 //

26 //

27 //

28 //

III. CONCLUSION

Plaintiff's Amended Complaint fails to state any viable cause of action against the hospital, CPMC. CPMC cannot be liable to Plaintiff RUDEN for breach of a fiduciary duty which California law establishes that it did not owe to him. There is no factual or legal support for Plaintiff's negligent misrepresentation claim against CPMC.

Accordingly, CPMC respectfully requests that this Court dismiss CPMC from this action with prejudice.

DATED: March 11, 2016.

DAVIDOVITZ + BENNETT

By: /s/
HILARY E. YOUNGBLOOD
Attorneys for Defendant,
SUTTER WEST BAY HOSPITALS,
doing business as CALIFORNIA
PACIFIC MEDICAL CENTER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date below, I electronically filed the foregoing REPLY IN SUPPORT OF DEFENDANT CALIFORNIA PACIFIC MEDICAL CENTER'S MOTION AND MOTION TO DISMISS UNDER FED.R.CIV.P. 12(b)(6) AND 12(e); OR IN THE ALTERNATIVE FOR MOTION TO REMAND UNDER 28 U.S.C. § 1447(c) AND FED.R.CIV.P. 12(b)(1) with the Clerk of the Court by using the CM/ECF system which will send notification of such filing to all counsel of record in this action.

Dated this 11th day of March, 2016.

DAVIDOVITZ + BENNETT

By: /s/
HILARY E. YOUNGBLOOD
Attorneys for Defendant,
SUTTER WEST BAY HOSPITALS,
doing business as CALIFORNIA
PACIFIC MEDICAL CENTER